IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. RANSOM LOUIS COLLINS, Respondent.	Case No. SC05-108

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER=S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by felony information **01-002294CF-(RTC)** with the offense of unarmed robbery (victim Wilson Mitcham and/or Circle K Corporation). The offense allegedly took place on June 23, 2001. (V1;R2-3). On July 9, 2001, the state filed written notice of intend to seek an habitual offender sentence. (V1/R5-6). On May 22, 2001, a written APlea Form@ was signed by the Respondent, the assigned assistant state attorney and the court reflected an agreement to enter into an open plea of no contest to the offense as charged. (V1/R19-21). A transcript of the plea hearing (Supp/R103-112), reflects defense counsel, Karen Miller, advised the court the Respondent was an habitual offender and he was ready to plea, was Agoing to plea straight-up,@ and was requesting a sentencing date. (Supp./R105). Defense counsel further advised the court Respondent was entering a plea of no contest in case **01-2294**, there was no agreed upon sentence, the Petitioner had filed a habitual offender notice, and a presentence investigation report had been prepared. (Supp/R 105).

Respondent was sworn and a plea colloquy was conducted. (Supp/R107-111). In pertinent part, Respondent acknowledged he was entering a plea of no contest to the charge of strong armed robbery, a second degree felony. (Supp/R107). There was no agreement as to what sentence would be imposed by the court.

The court would listen to what Respondent and his attorney had to say, would read the PSI report, listen to the prosecutor, and then make its decision. (Supp/R108). Respondent acknowledged he knew a notice to seek habitual offender sentence had been filed, and that if the Petitioner proved Respondent was a habitual offender, this would allow the court to sentence Respondent to more than the guidelines; that the guidelines indicated a maximum of 15 years, but the court could double this to 30 years. (Supp/R109). The low end of the guidelines was 85.6 months. (Supp/R110). The court accepted Respondent=s plea as freely and voluntarily given, took judicial notice of the probable cause affidavit in the court file, and found there was a factual basis for the plea. (Supp/R111).

A sentencing hearing was conducted on June 28, 2002. (V2/R26-76). The prosecutor, Assistant State Attorney, Claudia Stewart, advised the court it had certified copies of prior convictions, but not copies of those certified copies. The court stated it would let defense counsel look at them as they are offered into evidence [for cross-examination purposes]. (V2/R28-29).

Petitioner called Harry Schumacher, Lee County Sheriff=s Office latent print examiner for the past six years. The defense stipulated the witness was an expert in latent print examination. (V2/R30). The prosecutor asked the court to take

judicial notice of prints in the instant case **01-02294** taken on May 22, 2002, when the Respondent entered his plea in this case. The court took judicial notice of State Exhibit 1. (V22/R30-31;2dSupp/R118). The witness acknowledged he had been provided with Exhibit 1, the known prints of the Respondent by the Sheriff:s Office. (V2/R31).

The prosecutor then produced State Exhibits 2-7 and allowed defense counsel an opportunity to review them.

State Exhibit 2 is a judgment and sentence in case **85-1047CF, dated October 6, 1986**, a Lee county case for Burglary/ Dwelling (count 1) and Grand Theft (count 2) indicating one Ransom Louis Collins entered pleas of guilty to both charges and was adjudicated. His probation was revoked. He was sentenced to 15 years prison on count 1 and 5 years imprisonment on count 2 to run concurrently. Those sentences to run concurrently with sentences imposed in case **86-1199CF.** (2dSupp/R119-123 State Exhibit 2;V2/R31-32). The prosecutor advised the court Respondent was released from DOC on these charges on May 29, 1992 (V2/R31).[1]

State Exhibit 3 is an order of probation in case **86-0058CF**, **dated January 31, 1986** with fingerprints attached reflecting one

[1] This is reflected in the certified document from DOC reflecting Ransom Collins was sentenced in case 85-1047 on October 6, 1986 and released from prison on May 29, 1992 [State Exhibit 9 (2dSupp/R148)

Ransom Lewis Collins pled guilty and was adjudicated guilty to burglary (ct.1), dealing in stolen property (ct.2) and grand theft (ct.3) and was placed on probation for AFifteen (15) yrs Ct. I, 5 yrs., Ct. II, 15 yrs, to run concurrent, and concurrent with Cases **86-57CF, 86-0140CF, and 85-1047CF**@. The attached fingerprinted case reflected the prints were taken on January 27, 1986. (2d Supp/ R124-126)]. The prosecutor advised the court Respondent was released from the Dept. of Corrections on 5-2/92 (V2/R32), then stated it was the same release date as in case **85-1047.** (V2/R33)[2].

State Exhibit 4 is a Judgment and Sentence entered on **October 6, 1986,** against one Ransom Lewis Collins in case **86-57CF** indicating defendant entered pleas of guilty to burglary/structure (Ct 1), dealing in stolen property (Ct 2) and grand theft (Ct 3), defendant was adjudicated, his earlier probation was revoked and he was sentenced to 5 years prison for Ct 1,15 years prison for Ct 2, and 5 years prison for Ct 3, all to run concurrently with each other and ACONSECUTIVE TO **86-1199CF** BUT CONCURRENT WITH **86-1047".** (2DSUPP/R127-132;V2/33). The prosecutor advised the court Respondent was released from DOC on

[2]The certified document from DOC reflects one Ransom Collins was sentenced in case **86-58**, on October 6, 1986 to 5 years for burglary/structure and 15 years for trafficking [dealing] in stolen property and was released on May 29, 1992. Evidently, his probation terms imposed on January 31, 1986 were revoked on October 6, 1986 [State Exhibit 9 (2dSupp/R148)

May 29, 1992. (V2/R33)[3].

State Exhibit 5 is an order of probation in case **86-140CF,** dated **January 31, 1986,** against one Ransom Collins indicating a plea of guilty and was adjudicated guilty of: burglary/dwelling (Ct 1,2,3),and grand theft (Cts 4,5,6) and was on probation for AFifteen (15) Years Cts. 1,2,3, 15 yrs, each, Cts. 4,5,6 each, to run concurrent, and concurrent with cases **86-57CF, 86-58CF, and 85-1047CF** (2DSupp/R133-135); an attached fingerprint card reflects the prints were taken January 27, 1986. The prosecutor stated the date of release from the Department of Corrections was May 29, 1992. (V2/R33-34)[4].

State Exhibit 6 is a Judgment and Sentence against one Ransom L. Collins in case **86-961**, **dated June 12, 1995**, reflecting the defendant entered a plea of guilty to possession of a firearm by a convicted felon. The defendant=s probation was revoked. He was adjudicated and sentenced to 10 years imprisonment to run concurrent with case **86-960**. (2dSupp/R136-140). The prosecutor advised the court Respondent=s release from

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[3]The certified document from DOC reflecting that Ransom Collins was sentenced in case 87-57 on October 6, 1986 and released from prison on May 29, 1992 [State Exhibit 9 (2dSupp/R148)

[4]The certified document from DOC reflects one Ransom Collins was sentenced in case **86-140**, on October 6, 1986 to 15 years for burglary/occupied dwelling and 5 years for 2 Cts of grand theft and was released on May 29, 1992. Evidently his probation terms imposed on January 31, 1986 were revoked on October 6, 1986 [State Exhibit 9 (2dSupp/R148)

prison was August 1, 1996. (V2/R34)[5].

State Exhibit 7 is a Judgment and Sentence in case **86-960, dated June 12, 1995** against one Ransom L. Collins reflecting defendant entered a plea of guilty to the offense of burglary/dwelling, his probation was revoked, he was adjudicated and sentenced to 10 years imprisonment to run concurrently with case **86-961**(2dSupp/R141-145;V2.R34). The prosecutor advised the court Respondent was released from DOC on August 1, 1996. (V2/R34)[6].

Petitioner had no objections to the admission into evidence of exhibits 1, 2, 3, 4, 5, or 6, but did object to State Exhibit 7 because the fingerprints were taken on a different date (September 18, 1986) than the date of the judgment and sentence (June 12, 1995). (V2/R36). The court noted the fingerprints were done when the man was placed on probation, the judgment and sentence were entered when the probation was revoked and overruled the objection. (V2/R37-38).

Petitioner=s witness, Harry Schumacher, the latent

[5]The certified document from DOC reflects on June 12, 1995, one Ransom Collins was sentenced to prison for 10 years for possession of a firearm by a convicted felon and was released on August 1, 1996 (2dSupp/R148)

[6]The certified document from DOC reflects on June 12, 1995, one Ransom Collins was sentenced in case 86-960 to prison for 10 years for burglary of an occupied dwelling and was released on August 1, 1996 (2dSupp/R148)

fingerprint examiner, stated he reviewed state exhibits 2-7, compared them with the known fingerprints of the Respondent back on May 23, 2002, and prepared a report regarding his findings. (V2/R38-39). The report was shown to defense counsel who then stated:

> I believe I stipulated. We:ll stipulate the fingerprints expert found those prints to be a match to the known comparisons of Ransom Collins.

(V2/R39).

The witness then testified he wrote a letter regarding his findings and testified:

> I found them to be identical to the standard case and they were so identified in my letter according to the date.
>
> (V2/R40)

State Exhibit 8 was admitted into evidence. (V2/R40). The exhibit, a letter indicated the witness compared the known inked impressions of Respondent, taken from the current case [01-2294CF] taken on May 22, 2002 to the case listed:

CASE#	**DATED**
85-1047CF	10/28/85
86-58CF	01/27/86
86-57CF	01/27/86
86-140CF	01/27/86
86-961CF	06/12/95
86-960CF	09/18/86

and found them to be identical. (2dSupp/R146).

Petitioner then moved to have admitted into evidence, the document under seal from Department of Corrections indicating Respondent was last released from prison on August 1, 1996. (V2/R40;2dSupp/R147-150). Defense counsel objected on the grounds of hearsay. The court overruled the objection on the grounds the document was under seal and was an exception to the hearsay under ' 90.803(8) as public records and reports. It was admitted into evidence as **State Exhibit 9**. (V2/R 40-41).

The Petitioner then moved into evidence **State Exhibit 10**, a letter under seal from the director of the Office of Executive Clemency indicating no restoration of civil rights, no pardon, and no application for clemency pending. Defense counsel again objected on hearsay grounds and the trial court again denied the objection stating the document was self-executing under '90.902(1)(a). (V2/41-42).

Petitioner then advised the court in the instant case **01-2294** the current robbery offense was committed on June 23, 2001, which was within 5 years of the Respondent=s release from prison for prior felony conviction, which release was on August 1, 1996. (V2/R42-43).

Defense counsel argued defense agreed Respondent had at

least 2 prior felony convictions, agreed the current felony was committed within 5 years of the Respondent=s release from prison for a prior felony conviction, and also agreed other qualifications were also met [no pardons and no pending postconviction motions to set aside any predicate felony convictions]. (V2/R44).

Defense counsel argued:

> ...[t]he statute also requires AIn order to be counted as a prior felony for purposes of sentencing under this subsection, the felony must have been resulted in a conviction sentenced separately prior to the current offense and ...and this is the part I=m getting at -- sentenced separately from any other felony conviction that is to be counted as a prior felony.@
>
> * * * *
>
> Our argument is, Judge, that Exhibits 2, 3, 4, and 5, on those the original date of sentencing was 1-31-86. So all of those convictions, okay, would only count as one according to paragraph 5, because they=re sentenced together. So items 2, 3, 4, and 5, count as one of two.
>
> We would argue that 6 and 7, which occurred later than the prior cases and were pled initially, the judgment and sentence that they have for 6 and 7 are not the original judgment and judgment and sentence, they=re violation of probation judgment and sentences. So the Court at this time has no way of knowing what the date of the original sentence was for State Exhibits 6 and 7.
>
> Therefore the state has not met its burden under section 5 that he has ever been

sentenced separately for two separate, you know, to meet the criteria of two separate felonies because items 2, 3, 4, and 5 are all concurrent with each other, but we don=t know the date that those were originally pled to, so for all we know they could have been sentenced back on the same date as the other offenses, we have no way of knowing.

So I would submit that the state has failed to make a prime facie case that they have complied with the statute...

We would submit that the state has failed to show that he has been convicted separately two prior times on felony convictions because the judgment for the last two cases are violations of probation which we don=t believe qualifies, we think they would have to have the original sentences as opposed to violation of probation sentences, we would argue that.

As a practical matter what happened is Ransom Collins went to jail. When he went to jail he got sentenced on a bunch of different things and he went to prison. On all of the ›86 cases he went to prison all at once. He got out of prison, two of the cases had probation following them, he was violated on those probations and then went back to prison on 86-960 and 86-961. So we have no way of proving when he was originally sentenced on those to cases. They may have been sentenced the same date, 1-31-86 .

(V2/R45-47)

The prosecutor, Ms. Stewart, then responded and the following discussion then took place:

Ms. STEWART: Your Honor, if what Ms. Miller is saying were the case then you could have somebody who had an astronomical number of prior all resolved on the same day.

THE COURT: That's what it says.

MS. STEWART: No, Your Honor, I think what this means is that you can't take one count out of a case and count it as a separate conviction. He was sentenced separately in every case, Your Honor, each case in and of itself sentenced separately. But we can't have a burglary of a dwelling and a grand theft out of one case number and then count that as two separate convictions.

THE COURT: I don't think it says that.

* * * *

MS. MILLER: The there's the case law that says if somebody comes into the courtroom and pleads guilty to 50 burglaries on one day and goes and gets sentenced on that date, that's one prior felony conviction for the purpose of the habitual felony statute. And the rule is clear and the state has presented all their evidence and they haven't proven the second prong of the test.

THE COURT: Well, let me ask you, look here, Exhibit 2, when, I look at the signature page, the last page, it shows done and ordered October 6, 1986, the fingerprints are all done on October 28 of ›85. I don't know what that's all about.[7]

Then we've got the next one which is Exhibit 3, again looking at it, there's not a signature page, but Exhibit 3 -- I'm sorry bottom of page 1, here it is January 31, of ›86, fingerprints taken January 27, 1986.

MS. MILLER: Yes, Judge, but that case, the case in item Number 3, of you look at the last page of that it's concurrent with

[7]State Exhibit 2 at 2dSupp/R119-123.

85-1047, so that doesn't count as a separate conviction because it's concurrent.

THE COURT: Where is that?

Well, that's my argument is because it hasn't been sentenced separately 86-58 has been sentenced with Number 2, 86-57.

THE COURT: What does, sentenced separately mean? Different dates?

MS. MILLER: Well, I would argue that they get the first case which we agree is Number 2c would count as one, we agree with that. But then Numbers 3, 4, and 5 are all run concurrent with Count II, so we argue that Count II.

THE COURT: You mean Exhibit 2.

MS. MILLER: Exhibit 2, I'm sorry, would count as one.

* * * *

MS. MILLER: It says that on the last page of, last page of 86-58 -- on the last page of Exhibits 3, 4, and 5, they were never sentenced separately from 85-1047, they were always sentenced with 87-1047.

* * * *

MS. STEWART: Your Honor, because a sentence runs concurrently does not mean that it is not a separate sentence. If what Ms. Miller is saying were the way it was done you would never have the state or seldom have the state agreeing to concurrent sentences because it would preclude our coming in as an habitual felony offender for that very reason, that would encourage the state to say, no, everything has to be consecutive.

It says, what subsection 5, referred to by the defense says, says, in order to be

counted, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted. That doesn't mean that you can't run them concurrently, there's nothing in there that indicates for one minute that you're talking about concurrent.

* * * *

THE COURT: I'm looking at now, let's see, Exhibit 5, it doesn't say Exhibits 2, 3. and 4, the case numbers are all there, says all concurrent.

* * * *

THE COURT: So you think separately means not concurrently?

MS. MILLER: Right.

THE COURT: Ids there any case law?

MS. MILLER: No, I'm arguing that 3, 4, and 5 have never been sentenced separately, they've always been sentenced with Number 2, they've always been sentenced with 85-1047CF.

THE COURT: What about 86-960 and 86961?

MS. MILLER: Well, we don't know when the sentencing took place, Judge, the sentence, the judgment that she's giving you is just on a VOP, it's not the original sentence. That case originally could have been pled out on the same date as the others, we have no way of knowing that based on what they've entered into evidence.

They needed to bring in a copy of the original final judgment with them also and enter that into evidence to prove those were initially sentenced on the VOP in 1995, unless he has been sentenced at some point prior to that which would obviously, it

looks like would be back in 1986 sometime.

THE COURT: What do you think Ms. Stewart?

MS. STEWART: Your Honor, I vehemently disagree. He could have had a withhold of adjudication and when he violated that's when conviction, Your Honor. Also concurrent sentences are still sentenced separately, they are not all one criminal episode, they're not tried together.

Quite frankly I believe my argument is correct that you're talking about counts of the case, that each count is separate, but even if you rule against me on that, certainly sentences that run concurrently are still separate and that's why we have non-coterminus ending dates to sentences because even though run concurrent they end at different times according to how many days in on each case a defendant would have, so.

MS. MILLER: Judge, a plain reading of the law, it says, sentenced separately from the other felony convictions that is to be counted as a prior felony. That's what the law says. I mean, it's not -- I don't think it's really up for debate, I mean, if you just read it, the language is very clear.

MS. STEWART: Well, Your Honor, Ms. Miller doesn't have any case law --

MS. MILLER: There isn't any.

MS. STEWART: -- to support her position.

THE COURT: She's asking me to go where no judge has gone before.

MS. MILLER: Judge Balckwell's gone there.

THE COURT: Do you have any kind of

order that I could read that he wrote?

MS. MILLER: No.

THE COURT: Okay. Look, I find that the state has met the requirements that he is a habitual felony offender and I:ll explain why. Y:all can preserve the record. Here:s what I think.

Even if I accept the defense:s argument, okay that 2, 3, 4, and 5, he was sentenced concurrently, and he was, assuming I accept the state:s argument in 6 and 7, he violated his probation and then was sentenced after a violation of probation and a person is put on probation and then a final judgment is entered of jail time, that:s a revocation. It says right here on page 2. It:s a revocation and sentencing. It:s actually a brand new sentencing.

At the time I find somebody has violated his probation, I can give them whatever sentence I could have originally imposed. So this is a sentence under 6 and 7 and it:s a separate sentencing from 2, 3, 4 and 5, assuming I agree with the defense argument. I:m not really saying that I do, but even if I do, the state can preserve their position that I think has a lot of merit, that each case, even though they:re sentenced concurrently is a separate conviction.

I don:t think the statute is crystal clear. To me when I read it over the first time I thought they were talking about different dates of sentencing, not concurrent. It:s not really clear to me that concurrent sentencing is not separate sentencing.

I think that what they:re talking about is the same day, but just looking at the dates on 2, 3, 4 and 5, they:ve all got different dates that the final judgment was entered even though they all resulted in concurrent sentences. So I see a lot of

merit to the state=s position, but even accepting the defense position 6 and 7 were resentencing when he violated his probation.

MS. MILLER: Judge, there=s some case law that says basically of you plead to whole bunch of things in front of one judge, say in the morning, and that, you know, say plea to five cases in front of Judge A in the morning, those sentences count as one felony conviction.

However, if you then, suppose instead pleading to all five cases in front of one judge that morning, suppose you pled to four of them to Judge Corbin on the morning and then in the afternoon you went and pled the fifth one in front of Judge Reese, even if he sentenced concurrently in front of another judge and another time even on the same day in another courtroom, that counts as a separate conviction.

So it doesn=t necessarily go to the date, the case law kind of says you look at the whole factor. There=s no case law on my particular argument.

THE COURT: You=re essentially saying the state hasn=t met it=s burden on this.

MS. MILLER: Yes, that=s my argument.

THE COURT: Okay. I see the merit of it, the state hasn=t met it=s burden about what did happen, I=ll grant you that 2, 3, 4 and 5 are very confusing, but when I look at 6 and 7, I=m not confused at all. It says right there on page 2, revoke his probation and Judge Reese sentences him to prison, 10 years in 7, and 10 years in 6. Now those t2wo are concurrent and those were done simultaneously. So I accept 6 and 7 are a single felony, if you will, but there=s two and the last one he was released on 8-1-86 and that=s within five years of the date of commission of this crime which was..

> MS. STEWART: The commission of this was June 23, 2001, Your Honor.
>
> THE COURT: Right. That's within five years of this date, so I find he meets the criteria.
>
> I make another finding, I find that he meets the standard to be sentenced as a habitual felony offender and I do so designate.
>
> (VF2/R47-58)

Defense counsel stated they were ready to proceed to sentencing. (V2/R58).

Petitioner called Wilson Mitcham, who was the store clerk at the Circle K store was robbed by Respondent on June 23, 2001. He was alone in the store at the time. (V2/R59). He was working from midnight to 7 a.m. The offense took place 3 days before his 60th birthday. (V2/R61). Respondent came into the store about 4 a.m. (V2/R61). Respondent put a cigarette lighter on the counter and the witness rang it up. Respondent told him to open the register and give him all the money. He told Respondent he could not do that. Respondent reached in his [Respondent's] pants and told him to open the register. The witness was afraid Respondent might have a weapon. He was only about two feet from a telephone, but feared Respondent would get restless if he went for the phone. Respondent stepped back from the counter and with his hand in his pocket told the witness not to do it, things would get real bad. (V2/R62).

The witness testified he opened the register and Respondent leaned over the counter. He thought he handed Respondent some bills and Respondent then helped the victim empty the register. Respondent then left. (V2/R63). He was scared. (V2/R64).

On cross-examination, the witness acknowledged he never saw a weapon. He did not suffer any injuries. He has been the victim of a robbery in the past. (V2/R65-66).

Defense counsel had the trial court watch a video given to him be the state in discovery from the tape recorder of the Circle K the night of the robbery. Defense counsel commented, AThis is my client@ and ASee his hands are clearly visible, he has both hands on the counter. The whole time he=s talking to the guy he has both hands on the counter. Now he comes over the counter with both hands and reaches into the cash register.@ (V2/R67).

Respondent testified he knew he was charged with strong armed robbery. He has been in jail since the night of the robbery and he entered a plea of guilty because he was guilty. (V2/R68).

Asked by the court if he had any comments to make to the court as far as what a reasonable sentence would be considering he scored to a minimum sentence of 7 years and 2 months at the low end of the guideline[8] and the court could sentence him as

[8] The criminal punishment guideline scoresheet indicated a lowest permissible prison sentence of 85.6 months [12x7=84 +1.6 = 7 years and 1.6 months (V2/R80)

high as thirty years. (V2/R68-69).

Respondent told the court he pled guilty because he did the crime he was charged with. He did not go into the store with intent to hurt the victim or anybody else. He had no weapon, and no intent to rob the store to start with, but it just turned out that way. (V2/R69). He did not feel he deserved to go back to prison because he has not been in trouble for quite a long time and pleaded with the court to give him a split sentence and suspend half and give him probation or if prison time is given to split it and give him half prison and half probation so he could get out and be with his parents because his mother was ill and he feared he might not see her alive again if he went to prison. (V2/R69).

Defense counsel asked the court to sentence the Respondent to 8 years, which is close to the bottom of the guidelines. AHe is a habitual offender and he will do, my understanding right now is about a hundred per cent of the time.@ (V2/R71).

The prosecutor stated the video clearly showed Respondent had his hand either in or toward his pocket with a cocked elbow several times at the beginning. The victim testified he was terrified. (V2/R72). The state had offered a sentence of 15 years, which the state felt was fair considering Respondent=s history goes back to the mid ›80's. He is not even 35 years old for crimes including burglaries and possession of firearm by a

convicted felon, being the worst of the priors. (V2/R73).

The trial court orally sentenced Respondent to 20 years imprisonment as a habitual felony offender. (V2/R75).

The trial court rendered a written judgment and sentence in conformity with its oral pronouncement. (V2/R83-86). A timely notice of appeal was filed. (V2/R8).

Initially an Anders brief was filed by defense counsel. Respondent filed a pro se brief. The state filed a standard Anders answer brief.

By order of Second District Court of Appeal rendered on September 30, 2003, the appellate court asked defense counsel to address Respondent=s *pro se* argument concerning the sufficiency of documentation of convictions presented to the trial court. Specifically, the court asked defense counsel to address Respondent=s contention the sequential conviction requirement of ' 775.084(5) has not been met because the orders revoking probation included in the record do not disclose the original sentencing dates for these offenses. Counsel was asked to focus on whether the documentation provided would necessarily preclude the possibility Respondent was originally sentenced for each offense on the same day. If not, counsel was to address the legal significance of that fact. Counsel was ordered to file a supplemental brief within 25 days and Respondent to file a response within 25 days after the service of Respondent=s

supplemental brief.

Both parties filed their respective supplemental briefs.

On December 22, 2004, Second District Court of Appeal rendered its written opinion in Collins v. State, 893 So. 2d 592 (Fla. 2d DCA 2004) (copy attached). The opinion noted Petitioner had acknowledged the evidence as presented to the trial court did not preclude the possibility Respondent was originally sentenced to probation on the same day for each predicate offense and requested the case be remanded to the trial court to permit the State an opportunity to produce new evidence Respondent qualified for sentencing as a habitual felony offender, *id.* at 594. The Second District then made the following ruling and certified conflict with the First, Fourth, and Fifth District Courts of Appeal:

> ....In the sentencing proceeding, Collins's counsel specifically objected that the documents offered by the State failed to demonstrate a sufficient number of separately sentenced prior felony convictions. In previous cases, when an appropriate objection to a habitual felony offender sentence was presented in the trial court at sentencing, this court has not afforded the State a second opportunity on remand to demonstrate that the defendant meets the habitual felony offender criteria [n.2]. See Wallace v. State, 835 So. 2d 1281 (Fla. 2d DCA 2003); Rivera v. State, 825 So. 2d 500 (Fla. 2d DCA 2002); Reynolds v. State, 674 So. 2d 180 (Fla. 2d DCA 1996) [n.3]. Accordingly, we remand for resentencing under the Criminal Punishment Code.

We acknowledge that the position we have adopted on this issue is in conflict with the decisions of the First, the Fourth and the Fifth District. See Wilson v. State. 830 So. 2d 244 (Fla. 4th DCA 2002); Cameron v. State, 807 So. 2d 4th DCA 2002); Morss v. State, 795 So. 2d 262 (Fla. 5th DCA 2001); Roberts v. State, 776 So. 2d 1034 (Fla. 4th DCA 2001); Rhodes v. State, 704 So. 2d 1080 (Fla. 1st DCA 1997). We therefore certify direct conflict with Wilson, Cameron, Morss, Roberts, Rhodes, and Brown,...

Collins, 893 So.2d at 594.

SUMMARY OF THE ARGUMENT

There is no logical basis grounded in fact or in law to deny Petitioner an opportunity to re-establish Respondent=s qualification for HFO sentencing on remand simply because Respondent objected to the sufficiency of the evidence at the trial level during the sentencing hearing and yet uphold the right when no objection has been made to preserve the issue but the is clear on the face of the record. The resentencing hearing should be treated as a de novo sentencing hearing and Petitioner should be granted the right to again seek sentencing as a HFO upon proper proof and findings of fact.

ARGUMENT

ISSUE

WHEN AN APPROPRIATE OBJECTION TO A HABITUAL OFFENDER SENTENCE IS PRESENTED TO THE TRIAL COURT AND DENIED AND THE DISTRICT COURT OF APPEAL REVERSES AND REMANDS FOR RESENTENCING, MAY THE TRIAL COURT AGAIN IMPOSE A HABITUAL OFFENDER SENTENCE UPON PROPER EVIDENCE BEING PRESENTED BY THE STATE.

The standard of review is de novo.

There is clear certified conflict between the Second District in Collins v. State, 893 So. 2d 592 (Fla. 2d DCA 2000) where the appellate court held upon proper objection to an HFO sentence during the trial court sentencing hearing the State may not seek a second opportunity on remand to establish a defendant meets the criteria for habitualization and the Fourth District in Cameron v. State, 807 So. 2d 746 (Fla. 4th DCA 2002); Wilson v. State, 830 So. 2d 244 (Fla. 4th DCA 2002) and Roberts v. State, 776 So. 2d 1034 (Fla. 4th DCA 2001), First District in Brown v. State, 701 So. 2d 410 (Fla. 1st DCA 1997) and the Fifth District in Morss v. State, 795 So. 2d 262 (Fla. 5th DCA 2001) which give the State the right to again seek habitualization upon remand even where habitualization was objected properly objected to at the initial sentencing hearing, denied by the trial court and reversed and remand for resentencing.

Petitioner/State of Florida should be given an opportunity

to again present proper evidence Appellant has the requisite separate convictions to qualify for sentencing as a habitual felony offender on remand even though the properly objected to the sufficiency of the evidence of predicate conviction which was denied by the trial court and reversed on appeal.

There is no logical basis grounded in fact or in law to deny Petitioner such an opportunity to re-establish Respondent:s qualification for HFO sentencing on remand simply because the Respondent objected to the sufficiency of the evidence at the trial level during the sentencing hearing and yet uphold the right when no objection has been made to preserve the issue but is clear on the face of the record. *Cf.* Klauer v. State, 873 So. 2d 555 (Fla. 1st DCA 2004) where the issue is raised in a 3.800(a) motion and denied by the trial court and after being reversed on appeal, the State is give the right to again seek to sentencing as a habitual offender subject to evidence of satisfactory predicate convictions.]

Additionally, as the Fourth District reasoned in Cameron v. State, 807 So. 2d 746, at 747-748 (Fla. 4th DCA 2002):

> We have held a resentencing following reversal is a new proceeding. *See Altman v. State*, 756 So. 2d 148 Fla. 4th DCA 2000). Accordingly, the State will be provided the opportunity to introduce evidence establishing the grounds for rehabilitation... Upon remand, the trial court will once again have the discretion to sentence Cameron as a HFO upon proper proof

and findings of fact.

Petitioner would end his argument by saying, AThe Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.@ Harris v. State, 645 So. 2d 386, 388 (Fla. 1994) citing to United States v. Di Francesco, 449 U.S. 117, at 135 (1980) (quoting Bozza v. United States, 330 U.S. 160, 166-67 (1947). Nor would it be a violation to permit the trial court reimpose the same habitual felony offender sentence. *See* Harris, 645 So. 2d at 387-388.

CONCLUSION

Petitioner respectfully requests this Honorable Court reverse the decision of the Second District in the instant case and hold that regardless of whether the an appropriate objection to habitualization was made at the sentencing hearing, upon reversal and remand for resentencing due the State=s failure to establish the defendant=s qualification for habitualization, the State may again seek habitualization upon proper proof and findings of fact.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. mail to Tosha Cohen, Assistant Public Defender, P.O. Box 9000**C**Drawer PD, Bartow, Florida 33831-9000, this .

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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